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SUPREME COURT U. S.

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1906.

THE CHAPMAN & DEWEY LAND COMPANY,
Plaintiff in Error,
vs.
CHARLES H. BIGELOW, N. P. BIGELOW,
L. P. WALKER AND F. H. HARTSHORN,
Defendants in Error.

No. 262.

In Error to the Supreme Court of the State of Arkansas.

Petition for Rehearing.

HENRY D. ASHLEY,
WILLIAM S. GILBERT,
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Counsel for Plaintiff in Error.

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PETITION FOR REHEARING.

The said Chapman and Dewey Land Company, plaintiff in error, comes now and respectfully petitions this honorable court for a rehearing of said cause, which the court has dismissed on the ground of lack of jurisdiction, for the following reasons, to-wit:

I.

The controversy turns wholly upon the construction of the Government patents and surveys, which is necessarily a Federal question.

Because "AS THE PLAINTIFF IN ERROR CONTENDED, IN THIS COURT AND IN THE COURTS BELOW, THAT A PROPER CONSTRUCTION OF THE SURVEY AND PATENTS GAVE RIPARIAN RIGHTS COVERING THE LAND IN DISPUTE, AND THAT IT WAS NOT COMPETENT TO OVERCOME SUCH RIGHTS BY (*the incompetent*) EVIDENCE (*received below over plaintiff in error's objection as*) AFFECTING THE LEGAL IMPORT OF THE PLATS AND PATENTS, WE THINK A FEDERAL QUESTION IS THUS PRESENTED."

The *foregoing is the exact language of this court* in its unanimous opinion in *French-Glenn Live Stock Company* v. *Springer*, 185 U. S., 47, l. c., 54, excepting only the words in brackets, which we have added to show our further point entitling us to a rehearing, viz:

II.

The competency and legal effect of the evidence as bearing upon a question of Federal law is directly involved.

Because "WHEN THE QUESTION DECIDED BY THE STATE COURT IS NOT MERELY OF THE WEIGHT OR SUFFICIENCY OF THE EVIDENCE TO PROVE A FACT, BUT OF THE COMPETENCY AND LEGAL EFFECT OF THE EVIDENCE AS BEARING UPON A QUESTION OF FEDERAL LAW, THE DECISION MAY BE REVIEWED AS A SUPREME COURT OF RECORD MAY REVIEW THE PROCEEDINGS OF INFERIOR COURTS OF ORIGINAL JURISDICTION."

The above is the language of this court in *Mackay* v. *Dillon*, 4 How., 447, approved in *Dower* v. *Richards*,

151 U. S., 658, and quoted as the present rule by Mr. Hannis Taylor, an authority of international reputation, in his recent work on *Jurisdiction and Procedure of U. S. Supreme Court.* (P., 394.)

III.

The issues bring the controversy squarely within the foregoing declarations of law by this court.

Because plaintiff in error has claimed throughout the case that the *locus in quo is shown by the Government patents, surveys and field notes as water,* bordering upon the meander lines of its lands acquired by *mesne* conveyances under the Federal patents of which such plats and surveys are a part, and that the *locus in quo* therefore accrued to it by the riparian rights given by the admitted local law.

And the *defendants in error admit in their answer* (Tr., 77, 11th line from bottom of page), *that "at the time of the survey the meandered lines were run around this body of sunk and overflowed lands as if it had been a body of water,"* but claimed the field notes to show such water to have been land, whereby they contend the *locus in quo* passed by the township patents as swamp land to the State and to them as grantees of the St. Francis Levee District, the State's donee of undisposed-of land. The acreage recited as conveyed by the township patents is exactly that of the marginal surveyed lands of the townships.

IF THIS CONTENTION BETWEEN THE PARTIES AS TO WHETHER PART OF THE TOWNSHIPS PASSED UNDER THE FEDERAL PATENTS, SURVEYS, PLATS AND FIELD NOTES AS WATER OR AS SWAMP LAND BE NOT A FEDERAL QUESTION, THEN THE CONSTRUCTION AND EFFECT OF FEDERAL

PATENTS AND SURVEYS NEVER IS ONE, AND THE COURT OUGHT TO SAY SO EXPRESSLY, IF IT MEANS TO OVERRULE FRENCH-GLENN LIVE STOCK COMPANY V. SPRINGER, 187 U. S., 47, WHERE IT DECLARED EXACTLY THE CONTRARY IN ACCORDANCE WITH THE LAW GIVING IT JURISDICTION OF RIGHTS CLAIMED UNDER AN AUTHORITY EXERCISED UNDER THE UNITED STATES, WHEN THE DECISION OF THE STATE COURT IS AGAINST SUCH RIGHT CLAIMED.

IV.

Because the findings of the State Court contrary to the Government plats of survey were utterly unsupported by any competent or contemporaneous evidence, hence this court cannot be concluded thereby.

ALTHOUGH THIS COURT MAY NOT REVIEW CONFLICTING TESTIMONY EVEN IN EQUITY CASES ON WRIT OF ERROR TO STATE COURTS, WE SUBMIT IT CAN NOT PROPERLY ABDICATE ITS JURISDICTION OF SUCH CASES, WHERE THE ACTS OF FEDERAL OFFICERS ARE INVOLVED, BY ACCEPTING WITHOUT QUESTION THE FINDINGS OF THE COURT BELOW, WHEN THE CLAIM IS MADE THAT THERE WAS NO COMPETENT EVIDENCE ADDUCED TO SUPPORT SUCH FINDINGS AS IN THE CASE AT BAR.

IN SUCH CASES THIS COURT MUST AT LEAST EXAMINE THE RECORD IN ORDER TO DETERMINE WHETHER THERE IS ANY COMPETENT EVIDENCE TO SUPPORT SUCH FINDING, OR CONSIDER THE OBJECTIONS MADE TO SUCH EVIDENCE BEARING ON A FEDERAL QUESTION, IN ORDER TO HAVE ANY EFFECTIVE JURISDICTION IN SUCH CASES, OTHERWISE IT WOULD REST IN THE POWER OF THE STATE COURTS BY AN UNWARRANTED STATEMENT OR FINDING TO DEPRIVE THE LITIGANT OF A FEDERAL RIGHT OR PRIV-

ILEGE GIVEN BY LAW. See authorities under point II herein.

The opinion of the Supreme Court of Arkansas itself shows the Federal surveys to have been made in 1849, and prior thereto, and attempts to construe a field note against plaintiff in error's claims, which in itself furnished a Federal question.

The opinion then quotes the testimony of Anthony, *who had only known the land since* 1874, *twenty-five years and more after the original surveys, and who testifies mostly as to present conditions* (Tr., 130 and 131), as do all the other *witnesses, none* of whom *had known the place even casually earlier than the late eighties* (Tr., 86, 103, 118 and 126), except Varner, who though an old resident of the neighborhood, "ain't able to say how much it has filled up, as he hadn't paid any attention about that," and only knew that his canoe couldn't now go where it used to.

As to the incompetency of this testimony to support the finding that the elevation of the "sunk lands" has not changed since the running of the meander lines, see pages 79 to 81 and 87 to 89 of plaintiff in error's original brief, and we challenge examination of the few pages of the record, 86 to 110 and 117 to 137, containing the testimony, or abstract of same at pages 26, 55 and 56 in plaintiff in error's brief, *that this court may determine for itself whether it can afford to oust itself of jurisdiction to pass on Federal surveys by conclusions drawn from such remote and conjectural testimony in opposition to the Government plats.*

V.

Because the plats of survey of 1845 and 1849 showing these "sunk lands" of the New Madrid earthquake as a lake bordering on plaintiff in error's meander lines, are the only evidence in the case as to conditions in 1850, the date of Swamp Land Grant.

In *United States* v. *Low*, 16 Pet., 166, this court said: *"The official return of the surveyor general has accorded to it the force of a deposition.* So we held in the case of the *United States* v. *Breward*, 16 Pet., 147, and *United States* v. *Hanson*, 16 Pet., 196."

In *Whitaker* v. *McBride*, 197 U. S., 510, *concerning a riparian claim to an unsurveyed island*, Mr. Justice Brewer said, speaking for the whole court: *"The official surveys made by the Government are not open to collateral attack* in an action at law between private parties," citing *Stoneroad* v. *Id.*, 158 U. S., 240, and *Russell* v. *Maxwell Land Grant Co.*, 158 U. S., 253.

The Supreme Court of Arkansas has itself held *testimony as to conditions, nearly thirty years after, not proper proof of the quality of the lands at date of the Congressional grant*, saying in *Hendry* v. *Willis*, 33 Ark., 837: "From divers natural and artificial causes, the surface of the earth is continually changing, and *lands which were wet, overflowed and unfit for cultivation in* 1850 *may now be high and arable."*

EVEN IF THE PLATS OF SURVEY ARE NOT ABSOLUTELY CONCLUSIVE, THEY AT LEAST MAKE A *prima facie* CASE, WHICH CAN NOT BE LEGALLY AFFECTED BY TESTIMONY AS TO CONDITIONS 25 TO 50 YEARS AFTERWARDS, WHICH TAKING INTO ACCOUNT CHANGES WROUGHT BY TIME, IS NOT AT ALL INCONSISTENT WITH THE SURVEY'S CORRECTNESS.

This court said in *Hardin* v. *Jordan*, 140 U. S., 371, l. c., all of which fits the facts in the case at bar:

"Besides, the plat of the lake and the land surrounding it, referred to in the patent granted to Holbrook, exhibits the various fractional sections surrounding the lake as immediately bordering upon it; and this as shown by the authorities already cited, constitutes the lake itself, the real boundary of the land, without regard to the meander. THERE SHOULD BE SOME EXTRAORDINARY PROOF OF MISTAKE ON THE PART OF THE SURVEYOR IN ORDER TO INTERFERE WITH THE PASSING OF THE LAND AS RIPARIAN LAND."

The remarks of Judge Caldwell in *Kirby* v. *Lewis*, 39 Fed., 74, *which are almost literally applicable to the evidence in pais herein*, show how far it is from extraordinary proof, "waiving consideration of its competency."

"In 1850 that country was sparsely settled, and most of the lands were in their natural state. There was no special landmark on the tract to attract attention to it, or distinguish it from the vast domain of wild lands surrounding it. None of the witnesses resided on or near the land, or had any interest in it. Not one of them knew where the lines or corners were until 1883, when they were pointed out to them by the plaintiffs, preparatory to their becoming witnesses in this case. Their attention was never called to this tract, any more than to any other 40-acre tract of wild land in that region. Their knowledge of it was acquired chiefly, if not solely, by occasionally traveling along a country road which ran on or near its western boundary. From such imperfect *data* they express the opinion, 35 years afterwards, that not more than 10 or 12 acres of the 40 was then dry land, and that the balance was swampy and overflowed. The integrity and veracity of the witnesses is not questioned, but they never possessed sufficient, accurate, and exact knowledge of this land to enable them to testify persuasively on this subject. They had no interest in the land, did not know its boundaries, and never went upon it and examined it with a view of determining how much

of it was swamp and how much dry land, until more than a third of a century after the grant. Whatever knowledge they had of the condition of the land in 1850 was acquired in the most casual and perfunctory way. It may be said in this case, as was said by the Supreme Court of the United States in an analogous case:

"Those who could testify from actual knowledge are perhaps all dead. The population of that time has all passed away, and the memories of any who may be living must be very imperfect."

WE RESPECTFULLY SUBMIT THAT IF THIS COURT IS BOUND BY THE UNWARRANTED FINDINGS OF THE COURT BELOW BASED WHOLLY ON CONJECTURE, THEN IT IS SHORN OF ITS INDEPENDENT JURISDICTION, AND CAN ONLY REVIEW THE DECISIONS OF STATE COURTS UPON FEDERAL QUESTIONS, WHEN SUCH COURTS ARE WILLING TO PERMIT IT, A PREPOSTEROUS POSITION FOR AN APPELLATE COURT TO ALLOW ITSELF TO BE PLACED IN, AND ONE FURTHERMORE DEPRIVING CITIZENS OF THEIR LEGAL PRIVILEGE TO HAVE REVIEWED BY THIS COURT THEIR CLAIMS OF RIGHTS UNDER AN AUTHORITY EXERCISED UNDER THE UNITED STATES.

However, if the court means to overrule its declaration in *Mackay* v. *Dillon*, 4 How., 447, approved in *Dower* v. *Richards*, 151 U. S., 658, ought it not to say so expressly, so that the limitations of its jurisdiction may be known?

VI.

Because the writ of error is dismissed on authority of following cases, all distinguishable from the case at bar, or in which the court retained jurisdiction on writ of error to a state court.

1. *Moreland* v. *Page,* 20 Howard, 522.

This "is a mere question of boundaries between two neighbors, both admitted to have valid grants from the United States."

2. *Lanfear* v. *Hunley,* 4 Wallace, 204.

"The error, if any were committed, was in locating it (the grant) upon the land, and fixing its boundaries. In the performance of this function by that court, no treaty, act of Congress or authority exercised under the United States was drawn in question."

3. *Dower* v. *Richards,* 151 U. S., 658.

A case cited by plaintiff in error and which *inter alia* declares:

"When the question decided by the State Court is not merely of the weight of sufficiency of the evidence to prove a fact, but of the *competency and legal effect of the evidence* as bearing upon a question of Federal Law, the decision may be reviewed by this court."

4. *Egan* v. *Hart,* 165 U. S., 188.

This case decided that "if the questions of fact found and decided in the State Court are adequate to determine the controversy between the parties, and broad enough to maintain a judgment independent of any Federal question, this court is without jurisdiction, although the State Court may have also decided such a question."

How can the judgment of State Court be maintained in the case at bar without overturning the official government plats of Tp. 12-6 and Tp. 12-7?

The fact that counsel for defendant in error in an effort to eliminate Federal question concedes in this court at the eleventh hour the finality of government plats and that the case is controlled by *Hardin* v. *Jordan* cannot affect the clear jurisdiction of this court on writ of error.

5. *Israel* v. *Arthur,* 152 U. S., 355.

State court decided that wife, who eloped with paramour in life time of husband and was afterwards and before death of husband divorced by such husband, was estopped to attack validity of divorce decree and claim widow's rights in deceased husband's estate. Mr. Chief Justice Fuller in opinion says:

"To review that judgment would be to overhaul the application by a State court of principles of public policy and of estoppel, which it is not within our province to do."

"It has been often held, at least in actions at law, that this court has no jurisdiction to reverse the decision of the highest court of a State upon a pure question of fact, *although a Federal* question might arise if the question of fact were decided in a particular way," citing *Dower* v. *Richards.*

All conceded, but here the United States Government plats and field notes have been overturned, without any competent evidence, because conceding the truth of all the oral evidence (See p. 55 of plaintiff in error's brief) there is nothing in such testimony inconsistent with absolute correctness of such plats, from which plaintiff in error's riparian rights flow.

Kean v. *Calumet Canal & Imp. Co.,* 190 U. S., 452.

6. *Hardin* v. *Shedd,* 190 U. S., 508.

How these cases came to be cited as an authority against plaintiff in error we respectfully suggest our in-

ability to see. They were on writ of error from the State court and the jurisdiction was maintained and judgment affirmed on authority of *Hardin* v. *Jordan,* the principal case on which plaintiff in error relies on the merits.

Mr. Justice White in dissenting opinions expresses doubt as to Federal jurisdiction, but Mr. Justice White has dissented in most of principal cases relied on by plaintiff in error, seeming to entertain the view that because the Supreme Court of the United States must apply the local law as to riparian rights after upholding the correctness of ancient government surveys, there is no Federal question. Can it be that a dissenting opinion in a case upholding plaintiff in error's contention both on jurisdiction and merits can be made the basis of a ruling dismissing a writ of error, because two distinguished members of this court dissent?

7. *Romie* v. *Casanova,* 91 U. S., 379.

This is a sixteen line opinion by Chief Justice Waite holding that both parties to controversy admitting the same title in City of San Jose, no Federal question was involved. In the case at bar the parties so far from admitting the same title to the *locus in quo* in the State of Arkansas, each claimed a different title through the Government patent to the State, one by riparian rights and the other claiming the place as swamp land.

8. *Horne* v. *Smith,* 159 U. S., 40; *Niles* v. *Cedar Point Club,* 175 U. S., 300; and other cases cited against us on the merits are fully distinguished at pages 89 to 91 of original brief (see also *Whitaker* v. *McBride,* 197 U. S., 514), and *Iowa* v. *Rood,* 187 U. S., 87, at page 13 of reply brief or plaintiff in error.

VII.

Because the ruling of the Secretary of the Interior on application of the St. Francis Levee District, donee of State lands and grantor of defendants in error, that the *locus in quo* was not Swamp Land under grant of 1850, but was water according to official plats, surveys and field notes, was not *res inter alios,* but a finding of fact within the clear jurisdiction of Land Department under acts of Congress.

VIII.

Because jurisdiction should be retained by this court of this cause and all doubts resolved in favor of petitioner in error and the United States be invited to intervene and set up its title to the *locus in quo,* that litigation should be ended and the titles finally settled to all these bottoms of what were at the time of government surveys non-navigable lakes and ponds formed by the "sunk lands" of the New Madrid earthquake of 1811 in the State of Arkansas.

In the case of *Whittaker* v. *McBride,* 197 U. S., 510, on writ of error from the Supreme Court of the State of Nebraska, which goes much farther than is necessary to sustain plaintiff in error's contention on the merits in this case, Justice Brewer in the opinion says:

"It must also be noticed that the government is not a party to this litigation, and nothing we have said is to be construed as a determination of the power of the government to order a survey of this island, or of the rights which would result in case it did make such survey. As we reserve the rights of the United States we do not even impliedly sanction the intimation contained in the opinion of the court below that, under the decision in *Hardin* v. *Jordan,* 140 U. S., 371, although, on non-navigable waters, riparian rights were not conferred by the State law, nevertheless the land beyond the banks

passed to the State in virtue of the patents of the United States to the lot owners. Upon that question we express no opinion."

No court in Christendom save this court can pass finally on the questions involved in this suit.

The Supreme Court of Arkansas in its opinion clearly in effect leaves the title to the *locus in quo* in the United States; the United States, through its Land Department in an opinion approved by Judge Willis Van Devanter, then law officer of the Land Department, has finally disclaimed any title in the United States. Many cases are pending in the State courts of Arkansas, and in the Federal Courts in Arkansas, involving this identical question; if a rehearing be ordered and the Attorney General be invited to intervene in behalf of the United States, much vexatious litigation will be avoided.

What more appropriate case than this one involving title to the very *locus in quo,* in regard to which the Land Department has repeatedly rendered opinions, both on applications for United States surveys, and on complaints of the agents of the Land Department of trespassing and timber cutting on Government lands.

And your petitioner prays, therefore, that an order be made for a rehearing of the argument in this case, on a day to be appointed by this court, and upon such points as the court may direct.

Respectfully submitted,

HENRY D. ASHLEY,
WILLIAM S. GILBERT,
DENTON DUNN,
ROBERT S. RODGERS,
Counsel for Plaintiff in Error.

I certify that in my opinion the foregoing petition for rehearing is well founded in point of law.

HENRY D. ASHLEY.
Of Counsel.

This Map is based on a map published by RAND McNALLY & Co in 1902 and is intended only to show the relative positions of the "Hatchie Coon Sunk Lands" or Lake and "Big Lake," as said lakes are meandered thereon; "Big Lake" being the locus in quo in Harrison v. Fite 148 Fed. Rep. 781.

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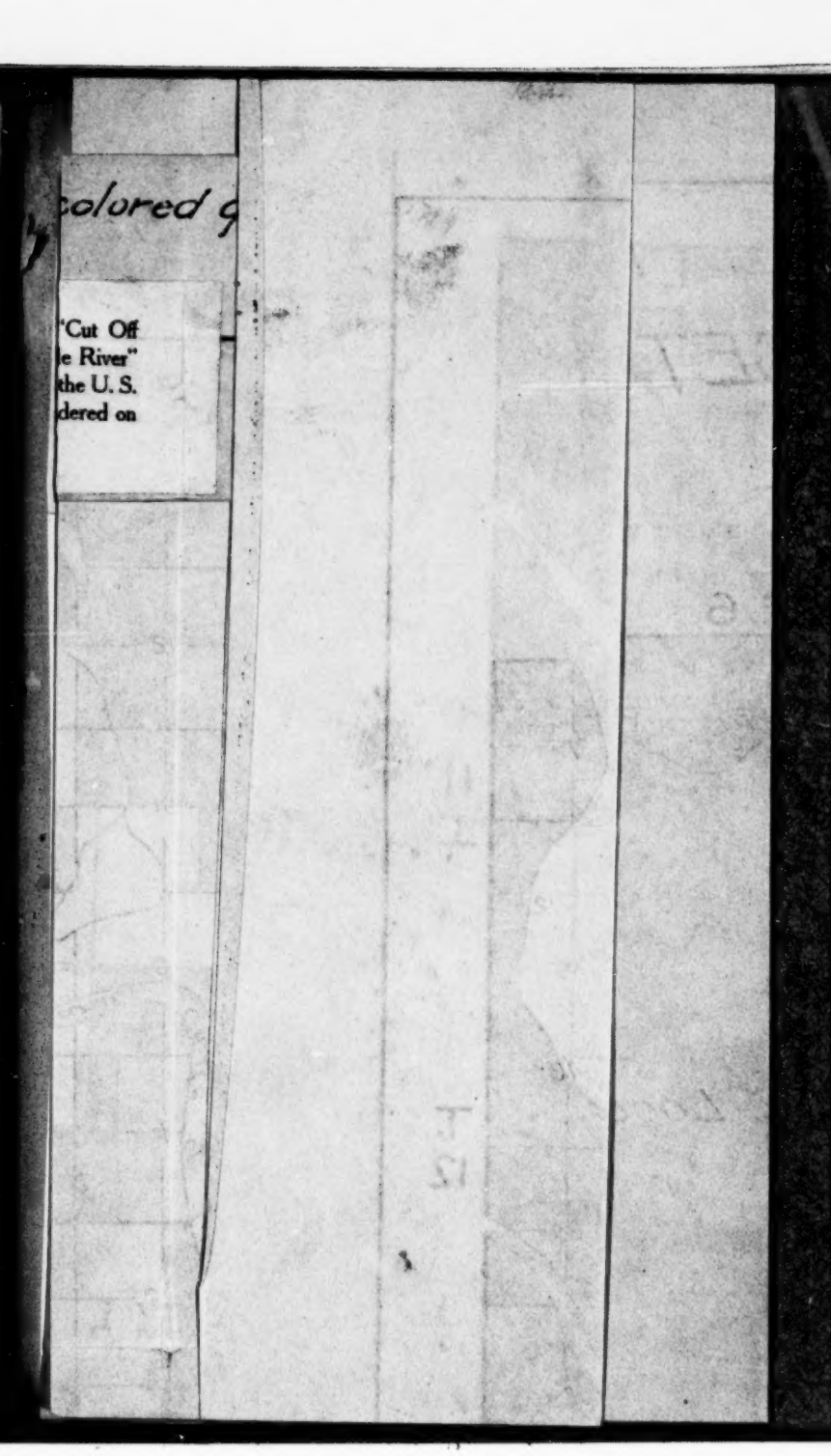
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